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AND
BRIEF

No. 16-992

In The
Supreme Court of the United States

MARISA N. PAVAN, ET AL.,

Petitioners,

v.

NATHANIEL SMITH, M.D., MPH,

Respondent.

On Petition For A Writ Of Certiorari To The Arkansas Supreme Court

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* FAMILY EQUALITY COUNCIL AND COLAGE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION

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MOTION OF AMICI CURIAE FAMILY EQUALITY COUNCIL AND COLAGE FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONERS

Amici Curiae Family Equality Council and COLAGE respectfully move for leave of Court to file the accompanying brief under Supreme Court Rule 37.3(b). Amici timely notified counsel of record for all parties more than ten days prior to the date of filing that Amici intended to file the brief and sought the parties' consent to the filing. Counsel for Petitioner provided consent and proof of the same has been lodged with the Clerk of the Court. Counsel for Respondent has not provided consent.

In this brief, Family Equality Council and COLAGE seek to provide insight into the concerns and experiences of children raised by same-sex couples who have been affected by unequal treatment of their families and, in particular, by the unavailability of birth certificates that name both of their parents. Family Equality Council, a non-profit organization, is well suited to provide this important perspective through its work supporting and representing this country's millions of lesbian, gay, bisexual, transgender, and queer parents and their children. Through Family Equality Council's Outspoken Generation program, children of same-sex couples and LGBT parents speak out about their families, share their stories, and become advocates for family equality. COLAGE is the only national organization for and led by people with a lesbian, gay, bisexual, transgender, or queer parent.

Based on its direct experience working with thousands of youth over the past 26 years, COLAGE can attest to the critical importance of recognizing and respecting these families on all levels: socially, institutionally, politically, and legally.

The accompanying brief of Family Equality Council and COLAGE shares the stories, worries, and views of individuals uniquely impacted by the issues before the Court: children of same-sex couples. Their perspective underscores the real-life impact of the Arkansas decision and the myriad practical, dignitary, and emotional harms that flow from permitting different birth certificate regimes for married couples depending on whether the spouses are of the same or different sexes.

Family Equality Council and COLAGE therefore request leave to file the accompanying brief of Amici Curiae in support of the petition for a writ of certiorari.

Respectfully submitted,

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INTEREST OF AMICI CURIAE[1]

Amici Curiae are organizations dedicated to promoting equality among our country's diverse families, in particular those comprised of lesbian, gay, bisexual, or transgender parents, same-sex couples, and their children. In this brief, Amici offer the stories of children of same-sex couples to convey the significance for them of having both of their parents named on their birth certificates and to underscore the harm the Arkansas Supreme Court decision inflicts by sanctioning inferior treatment for families with same-sex parents.

Family Equality Council is a community of parents and children, grandparents and grandchildren that reaches across the country, connecting, supporting, and representing LGBT parents, same-sex couples, and their children. Family Equality Council works extensively with the children of same-sex couples and LGBT parents, including through its Outspoken Generation program, which empowers these children to speak out about their families, share their own stories and become advocates for family equality. Family Equality Council submits this brief on behalf of all of the young people with whom it has worked.

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[1] Written consent to the filing of this brief was sought of all parties more than ten days before the filing of this brief. Only Petitioner consented, and proof of such consent is being lodged with this brief. Accordingly, a motion for permission to file this amicus brief is included herewith. No counsel for a party authored this brief, in whole or in part, and no person other than Amici Curiae, their members, and their counsel made any monetary contribution to fund the preparation or submission of this brief.

COLAGE is the only national organization for and led by people with a lesbian, gay, bisexual, transgender, or queer parent. COLAGE approaches its work with the understanding that living in a world that discriminates against and treats these families differently can be isolating and challenging for children. Based on its direct experience in working with thousands of youth over the past 26 years, COLAGE can attest to the critical importance of recognizing and respecting these families on every level – socially, institutionally, politically, and legally.

SUMMARY OF ARGUMENT

In most families, parents and children can take for granted that the children's birth certificates will name both of their parents, regardless of whether they share a genetic link. They can do so because state law has evolved over time to reflect that the parent-child relationship is not limited by biology.

In Arkansas, for example, when a child is born to a mother married either at the time of conception or birth or between conception and birth, the name of the woman's husband is entered as the father of the child on the birth certificate, regardless of whether the husband is the biological father of the child. Ark. Code § 20-18-401(f)(1). When a married couple uses donor insemination to conceive a child, the husband is the child's legal father and is named on the birth

certificate. Ark. Code §§ 9-10-201(a) & 20-18-401(f)(1)(A), (B). And when a child born in Arkansas is adopted, the State issues a new birth certificate – indistinguishable from an original – reflecting the adoptive parents as the child's legal parents. Ark. Code § 20-18-406(a)(1); Ark. Code R. § 007.12.1-5.5(a).

With this Court's decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), came the right to marry and access to the "constellation of benefits that the States have linked to marriage," *id.* at 2601, such as the right under Arkansas law for a birth mother's spouse to be listed as a parent on their child's birth certificate. Or so it appeared.

Petitioners are legally married couples who conceived children through donor insemination, gave birth, and, pursuant to state law, sought to have both parents' names listed on their children's birth certificates. *Smith v. Pavan*, 505 S.W.3d 169, 172-73 (Ark. Sup. Ct. 2016). The Arkansas Department of Health, however, listed only one parent – the birth parent – on each certificate. *Id.*

Despite this Court's ruling in *Obergefell*, the Supreme Court of Arkansas held that the state need not treat spouses of same-sex couples and spouses of different-sex couples equally when it comes to issuing birth certificates. *Id.* Specifically, it held that the state need not identify same-sex spouses as parents on their children's birth certificates. In applying Arkansas law to married couples differently, depending on whether

spouses are of the same or different sexes, the Arkansas Supreme Court's decision undermines marriage equality and its attendant benefits and harms the children of same-sex couples.

Amici offer the perspectives of children raised by same-sex couples, all of whom share the same interest in legally accurate birth certificates as their counterparts born to different-sex couples do. These individuals are uniquely positioned to explain how children are harmed when their families are treated as different and inferior. Their experiences will help the Court understand what the Arkansas decision means and why this Court should grant review.

ARGUMENT

I. CHILDREN OF SAME-SEX PARENTS NEED BIRTH CERTIFICATES THAT LIST BOTH PARENTS FOR THE SAME REASONS OTHER CHILDREN DO

She brought me to the hospital, and the doctors wouldn't treat me because they couldn't prove she was my "real" mom because she wasn't on my birth certificate.

Kinsey Morrison, raised by two mothers[2]

[2] Statement from Kinsey Morrison to Family Equality Council (Feb. 23, 2017). All statements cited in this brief are on file with amicus Family Equality Council.

Birth certificates – which Arkansas' Department of Health calls "the definitive legal documents of identity"[3] – serve important legal and practical functions. A birth certificate is "the only common governmentally-conferred, uniformly-recognized, readily-accepted record that establishes identity, parentage, and citizenship, and it is required in an array of legal contexts." *Henry v. Himes*, 14 F. Supp. 3d 1036, 1050 (S.D. Ohio), *rev'd sub nom.*, *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev'd sub nom.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Under Arkansas law, a birth certificate is *prima facie* proof of parentage,[4] and, as such, is a critical document affecting the child's legal rights and benefits from early childhood on, including the child's schooling, medical care, right to state and federal benefits, right to care for his or her parent, inheritance rights, and death benefits.

A birth certificate can affect who may enroll a child in school, who may pick the child up from school, who may be listed as an emergency contact, and who, in general, may make educational decisions. As Elliott Emfinger, a young woman raised by two mothers in Birmingham, Alabama, remembers: "[W]hen I first

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[3] Arkansas Dep't Health, *ADH: Vital Records/Statistics*, *available at* http://www.healthy.arkansas.gov/programsServices/certificatesVitalRecords/Pages/default.aspx.

[4] Ark. Code § 20-18-305(5).

started kindergarten, Sibbie wasn't allowed to sign me out of school. It was ridiculous – she's my *mom*."[5]

Many children in Arkansas are in the same position Elliott was. For example, the rules of some Arkansas public schools allow only those parents named on the child's birth certificate to receive educational information absent a court order.[6] And in many states, a birth certificate may be required to enroll the child in school.[7]

Even more critically, a child whose parent is not listed on a birth certificate may face delay in emergency medical care as doctors determine whether a parent has authority to consent to the child's treatment.

Unfortunately, this risk is not hypothetical. Kinsey Morrison, a young woman raised in Kentucky by

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[5] Elliott Emfinger, "I Helped My Moms (Finally) Get Married!" SEVENTEEN (June/July 2015), *available at* http://www.seventeen.com/life/real-girl-stories/a31943/i-helped-my-moms-finally-get-married/; Statement from Elliott Emfinger to Family Equality Council (Nov. 3, 2015).

[6] *Bryant Pub. Schools Student Handbook* 14, *available at* http://bryantschools.org/system/files/documents/570/Elementary%20Handbook%202016-17.pdf.

[7] *See* Ark. Code R. § 005.15.2-11.02 ("A birth certificate, Social Security Number, or other documentation, as provided by law, shall be required to enroll in school."); Ohio Rev. Code Ann. § 3313.672(A)(1) (birth certificate among documents to be presented upon entry to school); La. Rev. Stat. § 17:167 ("All children upon entering a parish or city school system or private school in the state of Louisiana for the first time shall be required to present a copy of their official birth record to the school principal.").

her two mothers, had a life-threatening reaction to a vaccine when she was just a week old. But the mother who brought Kinsey to the hospital was not listed on Kinsey's birth certificate. Because hospital staff "couldn't prove she was [Kinsey's] 'real' mom," they would not begin medical care:

> My [birth] mom Karen had to get to the hospital before they would treat me, and she had to check me in and sign the insurance paperwork.[8]

To add insult to injury, Kinsey's other mother, Audrey, had to wait in the hall as doctors worked on her infant daughter.[9]

Kinsey's mothers have since married, and both of their names now appear on the birth certificates of their three children. Kinsey, now a college student, recounts that just a few weeks ago, Audrey was required to "show 'proof of parenthood'" to take Kinsey's younger sister to the doctor. "[I]f she hadn't had [my sister's] birth certificate, they would have been turned away."[10]

Unfortunately, what happened when Kinsey was a baby is not unusual. Eleven-year-old K.S. has been raised by two mothers in Mobile, Alabama. He knows them as equal parents: "We play games, watch movies,

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[8] Kinsey Morrison, *supra* n. 2.

[9] Statement from Kinsey Morrison to Family Equality Council (Feb. 27, 2015).

[10] Kinsey Morrison, *supra* n. 2.

go to the beach and have fun. My Mommo picks me up from school every day, and my Mommy makes the best fried chicken."[11] But when K.S. was just three months old, a heart condition required open-heart surgery, and his non-birth mother was not permitted to assist in his hospital care because she did not have paperwork proving she was his parent.[12]

Birth certificates also impact other important areas of children's lives. These include obtaining survivor benefits through social security,[13] enrolling a new child in a parent's health insurance plan, verifying parental relationship under various federal statutes,[14] claiming

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[11] Statement from K.S. to Family Equality Council (Nov. 2, 2015). Minor children quoted in this brief do not seek anonymity. Initials are used for minors pursuant to the Court's direction in the context of merits briefs that names of minor children "should not be included in either the paper or the electronic version of a filing." Court's Guidelines for Electronic Submission of Briefs on the Merits (Oct. 1, 2013).

[12] Statement from Cari S. to Family Equality Council (Nov. 3, 2015).

[13] *Survivors Benefits*, Social Security Administration, *available at* https://www.ssa.gov/pubs/EN-05-10084.pdf at 5; *Information You Need To Apply for Child's Benefits – Form SSA-4*, Social Security Administration, *available at* https://www.ssa.gov/forms/ssa-4.html.

[14] *See, e.g.*, 20 C.F.R. 401.45(b)(6) (allowing birth certificate to verify relationship in connection with a request to the Social Security Administration on behalf of a minor); 31 C.F.R. 1.34 (birth certificate can establish parentage for a minor declared incompetent under Treasury Department regulations); 45 C.F.R. 5b.5(b)(2)(iii) (birth certificate can establish relationship to minor in connection with public welfare records); 29 C.F.R. 825.122(k) (birth certificate as evidence of relationship to care for parent or child under Family and Medical Leave Act).

dependency benefits through worker's compensation,[15] and establishing entitlement to other state benefits.[16]

A birth certificate is generally required to obtain a passport for a minor child,[17] which can present particular challenges if the non-birth parent who is not on the birth certificate is the only U.S. citizen parent. A child's ability to travel alone with the parent not listed on the birth certificate can also be impeded, as some countries require a birth certificate when one parent travels alone with a child.[18] The U.S. Department of State recommends that LGBT parents traveling outside the country "consider carrying documents regarding parentage and/or custody for accompanying minor children."[19]

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[15] *See In re Rodriguez*, No. F508002, 2006 WL 2303317, at *1 (Ark. Work. Comp. Comm'n July 10, 2006) (referring to birth certificates as "necessary" in "establishing dependency benefits").

[16] *See, e.g.*, Ark. Code § 24-12-117(b) (birth certificate serves as proof in connection with survivor benefits for certain public officers and employees); Ark. Code R. § 208.00.1-2212 (birth certificate serves as proof of parental relationship when applying for Transitional Employment Assistance).

[17] *See* 22 C.F.R. 51.28(a)(2) and (3)(ii)(A); *Children Under 16*, U.S. Department of State, *available at* https://travel.state.gov/content/passports/en/passports/under-16.html.

[18] *See, e.g.*, *Minor Children Traveling To Canada*, Government of Canada, *available at* http://www.cic.gc.ca/english/visit/minors.asp (minors travelling to Canada with only one parent should present, *inter alia*, the child's birth certificate as well as a letter of authorization from the non-travelling parent).

[19] *See LBGT Travel Information*, U.S. Department of State, Bureau of Consular Affairs, *available at* https://travel.state.gov/content/dam/students-abroad/pdfs/LGBTIflyer.pdf.

Anna Frackman, a medical student who grew up in Madison with her two mothers notes that:

> [In Wisconsin], there is a determination for next of kin, and you go down the line of choices and for our family, we don't fit into that list. We do not have a document that includes all of our names, that identifies us as a family.[20]

In *Obergefell*, this Court recognized that "birth and death certificates" are among the "aspects of marital status" that were denied to same-sex couples who were barred from marrying. 135 S. Ct. at 2601. Yet the Arkansas Supreme Court's decision would allow the state to continue denying this critical benefit to a subset of its married couples: those with spouses of the same sex.

"The inability to obtain an accurate birth certificate saddles" the children of these couples "with the life-long disability of a government identity document that does not reflect the child[ren]'s parentage and burdens the ability of the child[ren]'s parents to exercise their parental rights and responsibilities." *Henry*, 14 F. Supp. 3d at 1050.

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[20] Statement from Anna Frackman to Family Equality Council (Feb. 24, 2017).

II. AS THE COURT RECOGNIZED IN *WINDSOR* AND *OBERGEFELL*, TREATING FAMILIES DIFFERENTLY BECAUSE THEY ARE HEADED BY SAME-SEX PARENTS HARMS CHILDREN

> *When we hear the term "paperwork" our minds jump to boring things. But . . . a lot of the issues we are discussing revolve around paperwork and the power that it gives you. As an adopted child, and as a foster child, that paperwork means more to me than you will ever know.*
>
> Anthony Hynes, raised by two mothers[21]

> *For me it's more an issue of respect and legitimacy. These are my parents who raised me. They got up at four in the morning to drive me to volleyball tournaments. I can't believe what they did for me.*
>
> Anna Frackman, raised by two mothers[22]

In *Obergefell*, this Court rejected marriage laws that "harm[ed] and humiliate[d] the children of same-sex couples." 135 S. Ct. at 2600-01. Before that, the Court rejected the Defense of Marriage Act, which had made it more difficult for "tens of thousands of children . . . being raised by same-sex couples . . . to understand the integrity and closeness of their own family and its concord with other families in their community and

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[21] Statement from Anthony Hynes to Family Equality Council (Feb. 24, 2017).

[22] Anna Frackman, *supra* n. 20.

their daily lives." *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013).

When the Arkansas Supreme Court held that a state agency can refuse to name the spouse in a same-sex married couple on the birth certificate of their child – though it clearly could not refuse if the married couple is of different sexes – it sanctioned a legal framework "where children" once again "suffer the stigma of knowing their families are somehow lesser." *Obergefell*, 135 S. Ct. at 2600.

Spencer Lucker, who grew up in Little Rock, Arkansas with his two mothers, knows exactly what this means for children born to same-sex parents:

> Despite my parents having lived together and pursued thirteen artificial insemination procedures together as a couple (I was conceived on the thirteenth try), when I was born my [birth] mother was the only one allowed to be listed on my birth certificate.

When Spencer was born, marriage was not available to his parents. After 38 years together, Spencer's parents were finally able to marry. Under the Arkansas Supreme Court decision, however, if Spencer were born to his two parents today, he would still only have one parent's name on his birth certificate.

Spencer, now 29 years old, explains that "the parent on the [birth certificate] was something that would always come up":

> When you have to present your [birth certificate] it's a strong reminder, when only one of your parents is on the document, your family is different than everyone else's. Beyond the legal, it has an emotional and psychological element that is always underpinned for a kid growing up in the South.[23]

Denying same-sex spouses the full benefits of marriage – including listing both parents' names on their children's birth certificates – is a stark message to children that the government does not consider their parents' marriage to be the same as the marriages of different-sex couples. Seventeen-year-old J.M. from Kentucky explains: "Having both of my parents on my birth certificate validated the love my moms have for me. And without both parents being on there, that legitimacy would've been threatened daily."[24]

Anna Frackman, whose non-birth mother's name is missing from Anna's birth certificate, acknowledges that the incomplete document still creates complications from time to time. It came up, for example, when she was renewing her driver's license recently. But for Anna, "it's more an issue of respect and legitimacy." [25]

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[23] Statement from Spencer Lucker to Family Equality Council (Feb. 24, 2017).

[24] Statement from J.M. to Family Equality Council (Feb. 24, 2017).

[25] Anna Frackman, *supra* n. 20.

Anthony Hynes, 27, echoes this sentiment:

> I did not have one mom growing up – I had two, both of whom deserved full recognition on my birth certificate.

Anthony stresses that although having both parents on a birth certificate makes life easier "for a host of reasons," something also "needs to be said for the psychological impact having both parents on a birth certificate can have on a child." According to Anthony:

> From a psychological standpoint, the ability to have the same paperwork as other families is an affirmation of who – of what – we are: a family.
>
> I wanted a birth certificate that had both of my moms' names on it because I knew other kids had their parents' names on their birth certificates. I wanted my moms' names on my birth certificate so I could look back one day and show my own children a birth certificate representing an integral part of our family history.[26]

Molly Goren-Watts was raised by two mothers in New York and then Vermont. For the first twelve years of her life, only Molly's birth mother was listed on her birth certificate. As Molly recalls: "My birth certificate was just one piece of the entire picture of not being recognized as a family by most of the world around us."

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[26] Anthony Hynes, *supra* n. 21.

When Molly's non-birth mother adopted her, her parents were able to obtain a new birth certificate listing both names, but only after "a pretty arduous process" as New York officials struggled to figure out how to "change the form," and with one of Molly's mothers listed as her "father." As Molly explains:

> We were able to be validated and recognized in some way, but the experience also showed that they were trying to find a workaround to get our family to fit into their system – into their boxes.[27]

Now 37, Molly lives in Massachusetts with a wife and two children of her own. She is struck by the contrast between her childhood experience and that of her children:

> I was automatically on my children's birth certificates. We were always recognized as a family by the hospital and town clerks. The fact that they knew how to treat me and us – we were immediately legitimized.
>
> I think back on my experiences as a child of not fitting into the boxes or definitions that society had for us and my family not being validated – feeling like I had to always explain my family. . . . [Now] as the non-bio parent, I'm on the paperwork, on the birth certificate, there's never a question and either one of us can go into school and to the doctor and sign paperwork. To go into the clerk's office and . . .

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[27] Statement from Molly Goren-Watts to Family Equality Council (Feb. 28, 2017).

> [be] able to get copies of birth certificates when we need them – it blows my mind because of how easy it is. Being part of the system, being recognized, makes us feel like part of the community.[28]

Spencer Lucker notes that when his mothers were finally able to marry, adding his non-birth mother to Spencer's birth certificate "was the first thought that we had as a family." This, Spencer points out:

> says a lot about what it means, and how important a birth certificate is, in the eyes of the law, what it means for one's self-identity. Changing my [birth certificate] is symbolic for us as a family but it legitimizes my family in the same way [my mothers'] marriage certificate legitimizes their relationship.

Spencer emphasizes that his non-birth mother, Mary, "spent 29 years raising [him] and investing in [him]."

> She's just as much my parent. The significance of finally being able to confirm that all of the sacrifices she made, my parents made, and that I have made are worth it and are legitimate speaks to the psychological impacts of documentation that confirms your family structure, your history.

And now that Spencer is looking forward to having children of his own, he is struck by the importance of a

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[28] *Id.*

birth certificate that "further confirms [his] children's lineage and will connect Mary to her grandkids."[29]

Anna Frackman will soon be adopted by her non-birth mother and may then finally obtain a birth certificate that identifies both her parents. But she admits to some ambivalence about destroying what she sees as evidence of a time she hopes has passed forever:

> The whole progression of same-sex marriage rights is part of my story, and my birth certificate without my second mom's name on it is part of my story. . . . I lived through this time where my family didn't have legal recognition, and I want that to remain part of my narrative – I wish it wasn't, but it is.
>
> But now we are in a different world – kids born now don't need it to be part of their story. They don't have to experience what I did. This was something I and my family fought for so that future generations could have it.[30]

CONCLUSION

Children born to married couples in Arkansas receive birth certificates that identify both spouses as parents. Unless the spouses are of the same sex.

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[29] Spencer Lucker, *supra* n. 23.

[30] Anna Frackman, *supra* n. 20.

Though these children need birth certificates that name both parents as much as other children do, the Arkansas Supreme Court has said that their parents' marriages are different and that the state need not treat them the same when applying marriage-based laws.

In addition to the practical – and potentially dire – consequences of depriving children of birth certificates that list both of their parents, the Arkansas Supreme Court's decision would have us return to a world where states are free to "harm and humiliate the children of same-sex couples," causing them to "suffer the stigma of knowing their families are somehow lesser." *Obergefell*, 135 S. Ct. at 2600-01. This Court should grant the petition for writ of certiorari to prevent that harm and fulfill *Obergefell*'s promise of equality for the families of children with same-sex parents.

Respectfully submitted,

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